COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2597-CR **Cir. Ct. No. 2007CF153**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS D. LEMOINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Modified and, as modified, affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Dennis D. Lemoine appeals a judgment of conviction entered after a jury trial for first-degree sexual assault of a child under

thirteen, contrary to WIS. STAT. § 948.02(1)(e) (2009-10),[1] and an order denying his motion to suppress incriminating statements made to investigators in a noncustodial interview. Lemoine contends his statements were coerced and therefore involuntary where, among other things, an investigator induced the statements by promising that Lemoine would not spend that night in jail if he gave the "true story," and by suggesting that, if he were jailed, he would be unable to exercise his constitutional right to counsel. Assuming without deciding that the challenged portion of Lemoine's incriminating statements were involuntary and therefore should have been suppressed, we conclude that the court's admission of these statements was harmless error. Accordingly, we affirm the judgment.[2]

BACKGROUND

The Alleged Assault

¶2 The following facts are taken from trial testimony and exhibits. On the morning of April 23, 2007, Lemoine stopped by the home of Robert B. and Nichole B., Caitlin's parents. Lemoine was outside of the garage with Robert and another man when Nichole brought Caitlin home from Head Start. Caitlin, who was five years old at the time, told her mother that she wanted to jump on the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] We note that the judgment of conviction contains a typographical error. It incorrectly states that Lemoine was found guilty of WIS. STAT. § 948.02(1)(b), sexual intercourse with a person who has not attained the age of twelve years, when, in fact, he was found guilty of violating § 948.02(1)(e), sexual contact with a person who has not attained the age of thirteen years. This is a mere defect in the form of the certificate of conviction, which we may correct in accordance with the actual determination by the trial court. *See* ***Roberts v. State***, 41 Wis. 2d 537, 547, 164 N.W.2d 525 (1969). Accordingly, we modify the judgment to reflect that Lemoine was convicted of a violation of § 948.02(1)(e).

trampoline in the back yard, and Lemoine offered to watch her. Lemoine testified that he sat on the back porch steps as Caitlin played on the trampoline. Lemoine testified that, at some point, Caitlin ran to him from the trampoline and jumped up onto his lap. Lemoine is alleged to have sexually assaulted Caitlin at this time.

¶3 Four days later, Caitlin disclosed the alleged assault to her parents. Nichole called the Sauk County Sheriff's Department that night to report Caitlin's disclosure. On April 29, Caitlin's mother and grandmother and Baraboo Police Department Detective Stacy McClure took Caitlin to a Madison hospital for a sexual-assault examination ("SANE exam").

¶4 On the morning of April 30, Detective McClure interviewed Caitlin at the sheriff's department. The interview was video recorded and transcribed, and a DVD of the interview was played at trial. In the interview, the detective asked Caitlin repeatedly in various ways if anyone had ever given her a "bad touch," but Caitlin did not implicate Lemoine at this time. The detective and Caitlin then left the room, and Caitlin had contact with her mother. When the detective and Caitlin returned ten minutes later, Caitlin disclosed that Lemoine had pulled down her underwear and touched her "pee-pee."

Interview of Lemoine

¶5 Later that day, Detective McClure called Lemoine and asked him to come to the police station without providing a reason. Lemoine arrived within an hour, and the detective took Lemoine to a small room to be questioned. The interview was recorded and transcribed, and an edited version of the recording was played for the jury. Below, we set forth the parts of the interview that are pertinent to Lemoine's allegations of coercive police conduct. The unchallenged

part of the interview occurring before the alleged coercive conduct occurred is set forth later in this opinion in our discussion of harmless error.

¶6 Lemoine maintained his innocence when the detective confronted him with the assault allegations. After about a half an hour, Lieutenant Michael Stoddard joined the detective and Lemoine in the interview room. Shortly thereafter, the lieutenant told Lemoine that Caitlin had just "gone through some very lengthy medical procedures," an apparent reference to the SANE exam, and said that they were awaiting the test results. The detective also asked Lemoine for a DNA sample. (Lemoine agreed to provide a DNA sample but none was taken.)

¶7 The lieutenant then suggested he could "help out" Lemoine by limiting publicity if he "came clean."

> Lieutenant: … [Y]ou need to come clean with us; okay? Because we can help you out today.
>
> Lemoine: What do you mean you can help me out?
>
> Lieutenant: We can help you out with this today by not making a big production in the [paper], okay?[3]

The lieutenant told Lemoine that the district attorney said that they already had enough evidence to arrest Lemoine, and that investigators had "options" for dealing with him: "We can arrest you and put you in jail, and you go before the court tomorrow. We give you a citation and send you down the road. Or we can do nothing and wait until we've got everything." Lemoine said, "[j]ust give me the citation," to which the lieutenant responded that the choice wasn't Lemoine's.

[3] The official transcript reads "by not making a big production in the [inaudible] okay?" The lieutenant testified at trial that he said "paper."

¶8 Lemoine then said he was uncomfortable with Detective McClure in the room and that he would be more comfortable talking to Lieutenant Stoddard alone, and the detective left the interview room. The lieutenant returned to the subject of Caitlin's medical exam, and told Lemoine, "I don't think it's going to look too good for you when" the test results come in. The lieutenant told Lemoine that he was confident the allegations were true and said:

> Lieutenant: … Now, the bottom line is how messy do you want it to be?
>
> Lemoine: If I did anything—
>
> Lieutenant: You know damn well the harder we have to work and the more we do, the less sympathy we're going to have for you.
>
> Lemoine: I understand. I do understand that.

¶9 Lemoine asked how many years of incarceration he would face if he admitted to the allegations: "If—and I'm not saying I did anything in this—if I were to admit to anything, and I'm not claiming I am, what's—just right now what's the minimum? How many years in jail is this crap that he's accusing me of?" The lieutenant responded that it was a felony, but that he could not tell Lemoine the length of the sentence. Lemoine, who said that he had recently started a job as a truck driver, expressed concern that he would be unable to drive truck with a felony conviction. The lieutenant assured him that a felony conviction would not prevent him from driving truck. Lemoine responded, "I don't know. (inaudible) I don't know. I watch this CSI crap."

¶10 Lemoine asked what would happen if he admitted to the allegations. The lieutenant responded by promising Lemoine that if he gave the "true story … today" he would not spend the night in jail, that this would "give you time to call

an attorney ... [o]therwise, you know, we can lock you up" and that, in jail, he would not be able to make phone calls:

> Lemoine: So explain to me what happens if I admit to this. I'm not—I'm not—I mean, you're telling me all these things, "we can do this and this."
>
> Lieutenant: We can make this as rough as we want or as easy as we want. If we get the true story on you today, I'll see to it that you don't spend the night in jail; okay?
>
> Lemoine: Okay.
>
> Lieutenant: And it will give you time to call an attorney and get your ducks in a row; all right? Otherwise, you know, we can lock you up, if we choose to do so.
>
> Lemoine: All right.
>
> Lieutenant: Which kind of limits your ability of what you can get.
>
> Lemoine: What do you mean by that?
>
> Lieutenant: Well, you're not going to be able to make any phone calls or anything.
>
> Lemoine: I understand that.

¶11 Moments later, the lieutenant encouraged Lemoine to talk to the district attorney so that "it doesn't end up in court" or "in the public forum," and Lemoine said he would admit to the allegations if he were not taken to jail:

> Lieutenant: … [A]ctually, the best thing to buy you some time is if you talk to the DA, the district attorney, about it and then try to get things worked out so that it doesn't end up in court, it doesn't end up in the public forum.
>
> Lemoine: Okay. That's one thing, to keep it out of the public. My name's in there enough with these stupid friends of mine.
>
> Lieutenant: Yeah, well, birds of a feather flock together, you know. Hopefully, you're getting out of that.

> Lemoine: Okay. What's next?
>
> Lieutenant: Before I sit here and look like Bob Barker playing let's make a deal, we got to get this—
>
> Lemoine: Write down what you said about not going to jail, and I'll admit to it, please. I don't want—I don't want to go to jail….
>
> ....
>
> Lemoine: … I'm admitting to it now. Just don't take me to jail, and I'll admit to it.

¶12 Lemoine then characterized assaulting Caitlin as "the stupidest thing I've ever done" and that he "almost wrecked" his motorcycle on the way to the police station because he knew why he was being called in. Lemoine said that, when he was sitting on the back porch, Caitlin ran toward him and jumped up onto his lap. Lemoine admitted to placing his hand on Caitlin's private area as he was picking her up from his lap, and rubbing the area over the underwear for "10, 15 seconds." When asked repeatedly whether there was skin-to-skin contact, he first denied it, and then admitted to it. He repeatedly denied penetrating her. During a break in the interview after making his incriminating statements, a distressed Lemoine is seen alone in the room on the video saying to himself, "I can't believe I did this."

¶13 At the end of the interview, Lemoine was issued a citation, given a court date, and allowed to leave. On May 9, a criminal complaint was filed charging Lemoine with first-degree sexual assault of a child. Lemoine moved to suppress certain incriminating admissions made to investigators on April 30 on grounds that they were coerced. Lemoine contended these statements were involuntary, but conceded that he was not in custody at the time he made them. With the agreement of the parties, the court decided the suppression motion based

on a review of the video recording and transcript of the interview, and received briefs.

¶14 The court denied the motion in an oral ruling. The court's ruling included extensive factual findings regarding Lemoine's personal characteristics and the conduct of the investigators. A jury found Lemoine guilty of the charged offense after a four-day trial, and a judgment of conviction was entered against him. Lemoine appeals.

DISCUSSION

¶15 In this case we are asked to review the trial court's ruling that Lemoine's noncustodial statements to investigators were voluntary. The voluntariness of a statement is determined by applying constitutional principles to historical facts. *See* ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. We defer to the trial court's findings of fact concerning the circumstances surrounding the making of the statements, and review de novo the court's application of constitutional principles to those facts. ***Id.***

¶16 The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 8, of the Wisconsin Constitution prohibit the admission at trial of involuntary noncustodial statements. ***State v. Jerrell C.J.***, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. The due process test of voluntariness "takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." ***Dickerson v. United States***, 530 U.S. 428, 434 (2000) (citations omitted). These two factors are balanced against each other to determine whether the defendant's statements were voluntary. *See* ***Hoppe***, 261 Wis. 2d 294, ¶39-40. "The admission of an involuntary confession is a trial error, similar in both degree

and kind to the erroneous admission of other types of evidence," and is therefore subject to review for harmless error. ***Arizona v. Fulminante***, 499 U.S. 279, 310 (1991) (citation omitted); *see also* ***State v. Harris***, 199 Wis. 2d 227, 254-55, 544 N.W.2d 545 (1996) (adopting harmless error review for erroneous admission of confessions).

¶17 Lemoine argues that, in view of his limited education and lack of experience with the criminal justice system, his incriminating statements were involuntary where he alleges that: the lieutenant promised not to put him in jail that night if he told the "true story" and suggested that, if he were jailed, he would be unable to exercise his constitutional right to counsel; deception was used with regard to the SANE exam; ***Miranda***[4] warnings were not given; and the lieutenant offered to limit publicity and suggested the case could be kept out of the "public forum" even if he gave an incriminating statement. The State argues that Lemoine's statements were voluntary, asserting that the promise not to jail Lemoine in exchange for his cooperation was not coercive conduct because the investigators kept their promise by allowing him to leave after the interview. *See* ***State v. Owens***, 148 Wis. 2d 922, 931, 436 N.W.2d 869 (1989) (promise to consolidate charges in one county in exchange for cooperation was not an "impermissible, coercive police tactic which could have rendered the confession involuntary" because the promise was kept). Further, the State argues that Lemoine's statements were voluntary where: the lieutenant's representations about access to counsel from jail were "not patently false"; ***Miranda*** warnings were not required; the interview lasted only seventy-five to eighty minutes; and Lemoine

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

was a person of ordinary intelligence who was not particularly susceptible to coercive tactics.

¶18 We agree with the trial court that the balance of the defendant's personal characteristics against the tactics used by the police renders this is a "close case." However, we need not address the merits of Lemoine's voluntariness claim. Assuming without deciding that the challenged incriminating statements were made involuntarily, we nonetheless conclude that the trial court's erroneous admission of these statements was harmless beyond a reasonable doubt based on our review of the untainted evidence.[5]

Harmless Error Analysis

¶19 A constitutional error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 446, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). In conducting a harmless error review, an appellate court "examine[s] the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless." ***Harris***, 199 Wis. 2d at 256.

[5] We note that the State carries the burden to prove that a trial court error is harmless. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 231, 548 N.W.2d 69 (1996). The State's discussion of the untainted evidence and the impact of the tainted evidence is limited to two paragraphs and is underdeveloped. However, the harmless error rule is also "an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do." ***State v. Harvey***, 2002 WI 93, ¶47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. *See also* WIS. STAT. § 805.18(2) (no judgment shall be reversed unless the court determines, based on a review of the entire record, that the complained of error has affected the substantial rights of a party.) Accordingly, we conduct a harmless error analysis here.

¶20 The State presented the following untainted evidence at trial. The State called Caitlin, then seven years old, to testify. She testified that Lemoine had "pulled my dress up and pulled my underwear down and touched my private spot" on the back deck of her parents' house in Baraboo. She made this statement twice during direct examination, using the same words. Caitlin's testimony on direct examination was brief, and defense counsel's cross-examination did not directly challenge her allegations.

¶21 The State next called Caitlin's mother, Nichole, who testified that, on the day of the alleged assault, she had brought Caitlin home from Head Start and observed Lemoine outside with her husband, Robert, who was polishing the wheels of a vehicle. Nichole testified that she had known Lemoine for seven or eight years at the time. Lemoine would visit Robert at their house two or three times a week, and Lemoine's father was Robert's "best friend." Nichole testified that Caitlin asked her to go in the backyard and watch her play on the trampoline. When Nichole indicated she was busy, Lemoine offered to watch Caitlin, and went with her into the backyard. Nichole remained outside with Robert on the other side of the house. Ten to fifteen minutes later, Caitlin emerged from the backyard with Lemoine following after. Nichole noticed that Caitlin's dress was dirty, and Caitlin was crying because she had a sliver in her thumb from the back deck. Nichole testified that, four days later, Caitlin told her and Robert that the reason her dress was dirty was because she had sat on Lemoine's lap. Nichole testified that Caitlin then told her and Robert that Lemoine "had pulled her dress up and pulled down her underwear and put his finger in her pee-pee." Nichole said she contacted the sheriff's department that night and reported the alleged assault.

¶22 The State's next witness was forensic nurse Paula Darr, who conducted the SANE exam of Caitlin six days after the alleged incident. Caitlin

arrived at the exam with her mother, grandmother and Detective Stacy McClure. The nurse testified she observed "redness" near Caitlin's vaginal opening, which she said could have been from "inflammation, irritation or infection." The nurse testified she did not find evidence of sexual assault, but that "[i]f there is a penetration assault, tissue heals very quickly." The nurse testified that Nichole told her that, since the alleged assault, Caitlin "had become more secretive" and would not allow Nichole to wash her bottom, and that Caitlin's Head Start teacher had told Nichole that she had seen Caitlin playing by herself.

¶23 Detective McClure was the next witness to testify on the State's behalf. She said she accompanied Caitlin and her mother and grandmother to the SANE exam, and interviewed Caitlin at the police station the following day. A DVD recording of the detective's interview of Caitlin was played for the jury. In the video, the detective asks Caitlin repeatedly if anyone had ever given her a "bad touch," but Caitlin does not implicate Lemoine. After thirty-two minutes of questioning, the detective and Caitlin leave the room. According to the detective's testimony, Caitlin had contact with her mother at this time, but the detective did not see them talking. The detective testified that she asked Caitlin outside of the interview room if she would be willing to talk to her at another time, and Caitlin said "no, now" and led the detective back toward the interview room. In the video, the detective and Caitlin return to the interview room after about a ten minute break, and the following exchange occurs:

> Detective: Back in the interview room.
>
> Caitlin: Why?
>
> Detective: Because you told me when we were in the hallway that there was something else that you wanted to talk to me about.

Caitlin then says that Lemoine "wanted to go see if [she] wanted to jump on the trampoline."

> Detective: [Lemoine] took you to the trampoline?
>
> Caitlin: And I wanted to go in the house and get a drink of water but I couldn't because the door was locked and [Lemoine] wanted to go see the cycle over by the back by the dogs.
>
> Detective: [Lemoine] wanted to go see the cycle by the back steps by the dogs?
>
> Caitlin: (Nodding)
>
> Detective: And then what happened?
>
> Caitlin: Then [Lemoine] pulled down my underwear and he touches my pee-pee and—
>
> Detective: [Lemoine] pulled down your underwear and he touched your pee-pee?
>
> Caitlin: (Nodding)

Moments later, Caitlin says to the detective: "Can I tell you a secret?" In the video, Caitlin walks over to the detective and attempts to whisper in her ear, but the detective responds, "We have to say secrets out loud in here … okay?" After some delay, Caitlin whispers loud enough to be heard on the recording: "[Lemoine] likes my pee-pee."

¶24 The detective testified that, after the interview with Caitlin, she called Lemoine and asked him to come to the sheriff's department to answer some questions. Lemoine arrived at the police station within an hour, and the detective initiated an interview of Lemoine. A DVD recording of the interview was played for the jury. In the video, Lemoine is interviewed by the detective and, later, by

Lieutenant Michael Stoddard, for approximately forty-three minutes before the lieutenant engaged in the first instance of alleged coercive questioning.[6] During this untainted portion of the interview, Lemoine denied the assault allegations and presented the following version of events.

¶25 In the interview, Lemoine explained that, on the day of the alleged assault, he stopped by Robert's house as Robert was outside polishing a vehicle. When asked if anyone else was around, Lemoine volunteered that Robert's daughter, Caitlin, was there, and said he "watched her bounce on her trampoline for, like, five minutes" before walking away "because it was boring." When asked repeatedly if Caitlin had sat on his lap, Lemoine said she had not. When informed that Caitlin had said she had sat on his lap, Lemoine said: "[T]hat kid doesn't tell the truth. That kid's got some issues with her from when she was a little kid." Lemoine then denied ever sitting on the back porch or ever being alone with Caitlin in the back yard.

¶26 When asked if he had any contact with Caitlin that day, Lemoine responded that he "avoids her at all costs." Lemoine said he "never went in the back yard with the kid alone" because "I'm not going to get beaten the crap out of [me] in the back yard by a three year old or a four year old or whatever she is." Lemoine said that "the kid's got issues" and said she hit him in the back of the head with a chair once, and that she had also "smacked" him with wrenches.

[6] The State also called Lieutenant Michael Stoddard at trial. Stoddard's testimony on direct examination was almost entirely devoted to the allegedly tainted portions of the interview with Lemoine, and therefore does not bear on our consideration of harmless error.

¶27 Lemoine was the sole defense witness at trial. Lemoine provided the following trial testimony unrelated to the objected-to portions of his interview with investigators. Contrary to the interview statements detailed above, Lemoine admitted at trial that Caitlin had sat on his lap and that he touched her crotch, but testified it was an accident. In the testimony excerpted below, Lemoine testifies that Caitlin jumped up onto his lap as he was sitting on the back deck. Lemoine testifies that his arm came to be between Caitlin's legs "just by the way she landed" on his lap, and he then used his arm between Caitlin's legs to lift her off of his lap. By Lemoine's account, he accidentally came into contact with Caitlin's crotch as he was lifting her off of his lap and her crotch slid down his arm and then his hand for about "two seconds" or "within 10 seconds":

> Lemoine: … I sat down, and she acted like she was going to climb onto the trampoline, and she turned back and started running back toward the patio door so I put my hands down onto the step that I was sitting on, was just about to stand up, and she jumped on top of me.
>
> Counsel: What do you mean? How did she jump?
>
> Lemoine: Straight onto me.
>
> Counsel: Were you surprised?
>
> Lemoine: Yes.
>
> ….
>
> Counsel: What did you do?
>
> Lemoine: I was kind of in shock for a second and then, just the way she was, I picked her up and set her back down in front of me.
>
> Counsel: How did you do that?
>
> Lemoine: What do you mean?
>
> Counsel: How did you pick her up?

Lemoine: I had one arm around like her shoulders and the other arm, just by the way she had landed, was between her legs. I closed my arms together and picked her up. She was probably a foot and a half in the air. I set her down in front of me and slid her down.

Counsel: Which way were you facing?

Lemoine: Away from the house at the bottom step.

Counsel: How did you say you put her down?

Lemoine: I slid her down my arm.

….

Counsel: So when she slid down, how long did it take?

Lemoine: Not very long. It was definitely less than [two] seconds.

….

Counsel: When you slid her down, did your hand or your arm ever come into contact with her crotch?

Lemoine: Yes.

Counsel: How did that happen?

Lemoine: Because she slid down my arm.

Counsel: She slid down your arm. Did she go all the way down or half way and jump off?

Lemoine: All the way.

Counsel: When she slid down your hand, passed your hand with her crotch, did you feel anything?

Lemoine: Not really.

Counsel: This happened how long?

Lemoine: Within 10 seconds.

Counsel: As she was sitting down, did you feel uncomfortable?

Lemoine: Yes.

> Counsel: Why?
>
> Lemoine: Right at the end, when she reached my hand, because my hand was where it shouldn't have been, but it was because of the circumstances.
>
> Counsel: Did you put it there for any reason other than sliding her down to put her down on the ground?
>
> Lemoine: No.
>
> Counsel: How long was your hand in contact with her crotch?
>
> Lemoine: A matter of seconds.
>
> ….
>
> Counsel: Could you tell us whether or not she had any clothing on underneath the dress?
>
> Lemoine: Not for sure.

¶28 On cross-examination, the prosecutor explored the many differences between Lemoine's statements to the investigators in the first (untainted) portion of the interview and his direct examination testimony.

> Prosecutor: … [The detective] asked you about 10 minutes into that interview so at any time did Caitlin sit on your lap, right?
>
> Lemoine: Yes.
>
> Prosecutor: You said no, correct?
>
> Lemoine: Yes.
>
> Prosecutor: All right. A few seconds later she asked you and you said I never had that kid on my lap, right?
>
> Lemoine: Yes.
>
> Prosecutor: In fact, you said I was never even alone or near that child, correct?
>
> Lemoine: Yes.

Prosecutor: All right. She was briefly on your lap, right?

Lemoine: Yes.

Prosecutor: And so—and you were alone with her in the back yard, correct?

Lemoine: Yes.

Prosecutor: So when you said that, you told her a lie?

Lemoine: Yes.

Prosecutor: And then when she said you were never alone with her, you once again lied to [the detective]?

Lemoine: Yes.

….

Prosecutor: … And you said I didn't go in the back yard, correct?

Lemoine: Yes.

Prosecutor: All right. So you lied to [the detective] at that point?

Lemoine: Yes.

Prosecutor: And 50 seconds later she again said—she again asked you about going into the back yard, and you said—she asked you, you never went into that back yard? And you said nope?

Lemoine: Yes.

Prosecutor: All right. And that was a lie again, right?

Lemoine: Yes.

….

Prosecutor: Then you were asked were you ever on the back deck at all, right?

Lemoine: Yes.

Prosecutor: Okay. About 15, 16 minutes [into the interview] she asks, and you said no, correct?

Lemoine: To being on the back deck? Yes.

Prosecutor: She asked if you were ever on the back deck, and you said no?

Lemoine: Yes.

Prosecutor: That wasn't true either, was it?

Lemoine: Correct.

Prosecutor: That … was a lie?

Lemoine: Yes.

….

Prosecutor: Okay. The next point in the interview she was asking you if you had any contact or spent any time with Caitlin at all that morning; do you remember that?

Lemoine: Vaguely, yes.

Prosecutor; And you say—you use words, I avoid her at all costs—

Lemoine: Yes.

Prosecutor: —correct? So that wasn't true that day was it?

Lemoine: No.

Prosecutor: That was untrue?

Lemoine: Yes.

….

Prosecutor: … [A] few minutes [later] … you were again asked if you ever went in the back yard alone with Caitlin, right?

Lemoine: Yes.

Prosecutor: All right. And you told them no, correct?

> Lemoine: Yes.
>
> Prosecutor: All right. In fact, they asked you a second time shortly thereafter and you said no again, right?
>
> Lemoine: Yes.
>
> Prosecutor: Okay. So you lied again about being in the back with Caitlin?
>
> Lemoine: Yes.
>
> Prosecutor: Shortly after that you explained to them why you wouldn't be alone with Caitlin, and you said something to the effect that the child Caitlin was going to beat the crap out of you, right?
>
> Lemoine: Not in those words…. I believe [the lieutenant] is the one that said beat the crap out of you.
>
> Prosecutor: Right. He asked you. So you're telling us you were afraid to go and be alone with her in the back yard because she was going to beat the crap out of you…. Well, that wasn't true, was it?
>
> Lemoine: No.
>
> Prosecutor: That was a lie?
>
> Lemoine: Yes.

¶29 After establishing that Lemoine had repeatedly lied to investigators in the first half of the interview, the prosecutor asked Lemoine the following question:

> Prosecutor: So you repeatedly lied to the officer regarding what you describe as incidental, accidental contact with the buttocks of Caitlin …?
>
> Lemoine: Can you repeat that?
>
> Prosecutor: Yes. You had all these lies that you told them about a circumstance which you now claim was … entirely accidental, incidental contact with Caitlin['s] … butt?
>
> Lemoine: Yes.

¶30 Upon a thorough review of the untainted evidence and all reasonable inferences drawn therefrom, we conclude that it is clear beyond a reasonable doubt that a rational jury would have reached the same result absent the objected-to evidence. We reach this conclusion based on the State's affirmative evidence of guilt, Lemoine's admission at trial that he had touched Caitlin's crotch (albeit accidentally), and the many problems with both Lemoine's untainted interview statements and his trial testimony. As we explain below, no rational jury would have believed Lemoine's version of events presented at trial in light of the affirmative evidence of guilt against him.

¶31 The State presented ample evidence that Lemoine assaulted Caitlin. Seven-year-old Caitlin testified at trial that Lemoine "pulled my dress up and pulled my underwear down and touched my private spot." Caitlin's mother's testimony established how the assault allegations came to light, and she testified that Caitlin disclosed to her that Lemoine "put his finger in her pee-pee." The forensic nurse provided testimony from her conversation with Caitlin's mother that she and Caitlin's Head Start teacher had observed behavioral changes in Caitlin in the days after the alleged assault; Caitlin "had become more secretive," would not allow her mother to wash her bottom, and was seen playing by herself in class. Finally, in the video recording of the interview with the detective, Caitlin disclosed that Lemoine "pulled down her underwear and he touches my pee-pee." While it must be said that the interview is susceptible to a claim of witness coaching because Caitlin did not implicate Lemoine until after a break in which Caitlin had contact with her mother, the interview also contains a spontaneous disclosure that belies such a claim. After making the assault allegations, Caitlin walked over to the detective, said she had a secret to tell her, and volunteered that Lemoine "likes my pee-pee."

¶32 Lemoine took the stand in his own defense and admitted that he had accidentally touched Caitlin's crotch as he was lifting her off of his lap. He explained that Caitlin's crotch slid down his arm and his hand for about "two seconds" or "within 10 seconds" as he was setting her down on the ground. Given this testimony, a rational jury would have to determine on the untainted evidence whether Lemoine's contact with Caitlin's genitals was accidental, as he testified, or whether it was intentional for purposes of sexual contact and possibly more invasive. This determination would rest on an assessment of Lemoine's and Caitlin's competing versions of events, and on an evaluation of their relative credibility as witnesses.

¶33 Based on Lemoine's admitted false statements to investigators in the untainted portion of the interview, we conclude that no rational jury would have believed Lemoine's version of events presented at trial in light of the affirmative evidence of guilt presented against him. Lemoine admitted on cross examination to lying repeatedly to the detective about whether he was in the back yard alone with Caitlin, whether he had sat on the back deck, whether Caitlin sat on his lap, whether he touched Caitlin's crotch, and even whether he feared Caitlin would "beat the crap out of him" if he were alone with her in the back yard. These admissions would have substantially harmed Lemoine's credibility with any rational jury.

¶34 This testimony was all the more damaging to the defense because Lemoine failed to offer a reasonable explanation for these false statements. On cross examination, Lemoine acknowledged that the reason he lied to investigators about ever having had any physical contact with Caitlin was to cover up conduct that was, by his own account, merely accidental and incidental in nature. It strains credulity that a person who only accidentally grazed a child's crotch would lie

repeatedly about ever having touched the child or having been alone with her. Without a reasonable explanation for his deception in the interview, Lemoine's false statements appear to be an attempt to cover-up wrongful behavior, and indicate an awareness of guilt. Ultimately, the lack of a reasonable explanation for his false statements undermines the credibility of his alternate version of events at trial—if Lemoine only accidentally grazed Caitlin's crotch, then why did he falsely claim that he was never alone with her and that she never sat on his lap? Thus, the lack of a credible, alternate version of events combined with ample, affirmative evidence of guilt leads us to conclude, on the untainted evidence, that no reasonable doubt exists that any rational jury would have found Lemoine guilty absent Lemoine's objected-to incriminating statements.

¶35 Moreover, our review of Lemoine's objected-to incriminating statements indicates that they were not necessary to prove any element of Lemoine's crime and were to a degree cumulative; these statements merely provided additional evidence of Lemoine's guilt. *See* ***Harris***, 199 Wis. 2d at 262-63 (admission of physical evidence derived from involuntary confession was harmless where derivative physical evidence was "largely cumulative"). The apparent value of the objected-to statements to the State's case was largely to show that Lemoine's contact with Caitlin was intended for a sexual purpose. Proof of intent to touch Caitlin's genitals for a sexual purpose is found in Lemoine's admission that he rubbed her for ten to fifteen seconds, and by statements that indicated an awareness of guilt—calling the assault "the stupidest thing [he'd] ever done," admitting he "almost wrecked [his] bike" on the way to the police station because he knew why he was being called in, and saying to himself, "I can't believe I did this." However, as explained above, there is no reasonable doubt that, without this evidence, a rational jury would have still found

that Lemoine intended to touch Caitlin's genitals, given the ample affirmative evidence of Lemoine's guilt and the deep problems with Lemoine's alternate version of events.

¶36 Having concluded that, even if the court's admission of the challenged incriminating statements was erroneous, the error was harmless, we affirm the judgment as modified to reflect a conviction for sexual contact with a person under the age of thirteen, contrary to WIS. STAT. § 948.02(1)(e).

By the Court.—Judgment modified, and, as modified, affirmed.

Not recommended for publication in the official reports.